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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Respondent.

Petitioner's Reply Brief

JOSEPH D. RYAN,
100 N. LaSalle Street,
Chicago, Illinois,
Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 743

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

Defendant's contention that this case was tried on the issue of whether decedent was killed when the coupler broke or whether his death occurred on a later movement is only a half truth. While this issue was raised, it was only camouflage. Defendant's real defense was that it was not negligent in the use or maintenance of the coupling which broke.

Counsel told the jury that:

> "• • • the railroad company must use ordinary and reasonable care. There is not a word of evidence here that there was anything about the con-

dition of this coupler which could have caused anyone to believe that it was at all liable to break. So I say if that is the law you must necessarily find that there has been no proof here that the railroad company was negligent as concerns that coupler" (R. 158).

Again:

"There is not a word of evidence here, is there, that that car failed in any way to couple automatically by impact upon that movement or upon any other movement which this crew or any other crew made with that car" (R. 159).

Further:

"There is not a word of evidence in this record of any attempt to uncouple the E. J. & E. car upon which the coupler broke, and that it could not uncouple without the necessity of a man going between the ends of the cars.

"So far as that car is concerned, ladies and gentlemen, when you listen to Judge Campbell's instructions, listen and see if he doesn't tell you that this is the test of a violation of the coupler provision of the Safety Appliance Act, and if that is what he tells you is the test, then necessarily you must find that this car met that test because in neither one of those respects is there a word of evidence here as to any failure of that car to function in the two respects that the statute requires" (R. 159).

The foregoing are all quotations from counsel's final argument to the jury. While it is true that counsel also argued about which movement caused decedent's death, it is incontrovertible that the safety appliance issue was submitted to the jury, and submitted under a fundamental misconception of the law, the jury being told by counsel, with the court's approval, that before a recovery could be had on the safety appliance violation, negligence must be shown. Since we could prove no specific act of negligence, the jury necessarily found against us.

In the margin we have answered defendant's factual contentions, under the headings 1, 2, 3 and 4.

In *St. Louis & S. F. R. Co.* v. *Delk*, 158 F. 931, the defendant took the same position in respect to the Safety Appliance Act which is taken by the instant defendant. The Circuit Court of Appeals there held that the railroad discharged its statutory duty if it exercised reasonable diligence to keep the coupling in repair. This court, however, reversed the intermediate court, in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, holding that an absolute duty rested on the carrier "to provide and keep proper couplers at all times and under all circumstances." In view of this holding, the language of counsel which we have just quoted, and the action of the trial court in overruling our objection to it and thus approving it, cannot be justified.

Our motions for a directed verdict for the plaintiff, made at the conclusion of all the evidence and for a new trial following the verdict, were overruled (R. 222).

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1. Defendant's brief, p. 10, in attempting to prove that decedent was not killed on the movement when the coupler broke, asserts that it must be presumed that decedent, an experienced railroad man, "knowing the next movment was to be made onto this track would not put himself in a position of danger between the cars." This assertion is not only based on a false premise but is conceded to be false by defendant's counsel. He quotes from his argumnt, brief, p. 8, to prove that he accepted the foreman's testimony that it was not his intention to put any cars on track 5 on the movement when the coupler broke. In his argument to the jury, in commenting on the foreman's testimony on this subject, that no movement was to be made on that track at that time, he stated: "I will take his word for it." It thus appears that one of the chief reasons assigned by defendant in support of its contention that it was more likely that decedent came to his death on the final movement of the train out of the yard, rather than on the movement when the coupler broke, finds no support in the evidence. Decedent had no reason to apprehend danger from the movement being made at the time the coupler broke.

As pointed out and urged in our petition, the undisputed physical facts and circumstances in evidence proved conclusively that decedent came to his death as the result of the breaking apart of a defective coupler, as charged in the plaintiff's complaint. Defendant's contention that decedent met his death at a later time and on a later movement when the train was being pulled out of the yard is not supported by any probative evidence or by any legitimate inference. In order to reach any such conclusion it would be necessary to resort solely to speculation and conjecture.

In the case of *Brady, Administratrix* v. *Southern Ry. Co.*, 320 U. S. 476 (cited by defendant under Point II) which was an action under the Federal Employers' Liability Act for the alleged wrongful death of a brakeman, there was a judgment for the plaintiff which was reversed by the Supreme Court of North Carolina. That court held there was no evidence to support the verdict and that, therefore, the case was improperly sub-

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2. Defendant's second contention is that the fact that all the open couplers "coupled up following the impact indicated that at the time of the impact the deceased had reached a point about 200 feet east of the place at which plaintiff contends he was standing." This latter statement is just pure fiction. Decedent was last seen alive walking in a direction south of east towards track 5 (R. 79) from the north side of track 1, immediately after he had stated to the foreman that he had some couplings to make on the west end of that track (R. 37). Some of the cars which had been shunted in onto track 5 previously had failed to couple automatically. There were two openings between the cars. The first opening of about a car length (45 feet) commenced at the east end of the third car (numbering from west to east) at a point 65 or 70 feet east of the switch leading from the rip track onto track 5, just at a safety sign previously referred to at the place where the brush marks commenced (R. 58). Next to this opening there was a single car (the fourth car from the west) which had failed to couple and then a small gap between that car and the next one to the east standing on that track (R. 37). The second opening (the smaller gap) therefore, was just two car lengths, 90 feet (not 200 feet) east of the spot where decedent was struck.

mitted to the jury. This court, in affirming the Carolina court stated, pp. 479, 480:

> "• • • The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the triers of the fact—in this case, the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger*, 266 U.S. 521, 524. *Cf. Gunning* v. *Cooley*, 281 U.S. 90, 94; *Commissioners* v. *Clark*, 94 U.S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

Had the plaintiff been required, as an essential element of her case, to prove that the death of her husband occurred on this latter movement, the trial court would have been required to direct a verdict for the defendant on the ground there was no evidence to support the charge.

Viewed from any standpoint, the only question which could properly have been submitted to the jury was that of causal relation or proximate cause. As hereto-

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3. It is also urged by defendant that if the decedent was adjusting the coupler at the westerly opening at the time the coupler broke since the impact moved the cars about a car length (45 feet) his body would have been right at the opening between the cars where Jack O'Donnell could not have failed to see it as he passed along the side of the train inspecting the couplers. Defendant ignores the undisputed evidence that when the impact occurred both openings between the cars were closed and the cars were all coupled together. This in itself proves that the front of the third car which ran over and killed the decedent passed some distance beyond his body and that his body was lying underneath the side of the car several feet (the length of the second opening) west of the couplers between the third and fourth cars.

fore shown, the jury, under the court's instructions, were not required to consider or pass on that question.

II.

Some stress is laid on the fact that the stop which caused the coupler to break was violent, the implication being, apparently, that this coupler would have withstood normal usage, and that the accident may be laid to the conduct of the engineer rather than to the condition of the coupler. It is a matter of common knowledge that cars, in switching movements, are continually subjected to violent impacts, starts and stops. Normal use must be held to include the banging around which a car will get in switching. It surely cannot be maintained that a sudden or emergency stop of a train while traveling at a speed of eight or ten miles an hour is anything out of the ordinary in railroad operations. The car in question, with a partially fractured coupler, obviously did not meet any standards of safety whatever, whether normal or otherwise.

We cited a number of cases, in which it was either held or conceded that a defective coupler was a viola-

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4. The contention that decedent was 200 feet east of the westerly opening is further disproved by the undisputed physical facts. There were foot marks south of the safety sign in the center of the track. Proceeding eastward from this sign, there were brush marks and signs of dragging which extended a little over a car length (45 feet) to where decedent's body was found lying north of the north rail of the track and close up against it. There was a fresh chip knocked out of the safety sign (R. 54, 106, 107, 111). Decedent's lantern was found between the rails at this point (R. 52). If decedent fell or missed his footing while attempting to board one of these cars, the sides of which extended two and one-half to three feet over the rails, he could not possibly have fallen between the rails and made the marks indicated. Nor could he have fallen underneath the couplers in the center of the track and made the foot and brush marks found between the rails, had he been climbing over the drawbars and coupling appliances, while attempting to cross between the cars.

tion of the Act as a matter of law. Respondent attempts to distinguish these cases, for one reason or another. We will comment on them briefly.

In *Reetz* v. *Chicago & E. R. Co.*, 46 F. 2d 50, it was conceded that the parting of the train owing to the breaking of the couplers was a violation of the Act.

In *Erie R. Co.* v. *Caldwell*, 264 F. 947, where a train became separated because of a defect in a drawbar, the Circuit Court of Appeals approved an instruction that "the failure to comply with the federal Safety Appliance Act was a direct and proximate cause of plaintiff's injuries." The court, in the instruction quoted, held, as a matter of law, that the defect which caused the train to part was a violation of the Act.

In the case of *Keenan* v. *Director General*, 285 F. 286, in which a coupler dropped to the ground, the court said: "it was demonstrated * * * that there was a violation of the statute" (p. 290). In none of the foregoing cases did the court submit to the jury, as a question of fact, whether there was a violation of the Safety Appliance Act.

In *Kowalski* v. *Chicago & N. W. Ry. Co.*, 159 Minn. 388, the court said: "when they [the couplers] are so defective that the car to which they are attached cannot be held to another by means of the coupler, there is a violation of the Act" (p. 393). The jury were instructed in that case that the railroad was negligent if the coupling apparatus was broken or defective; the court held that the defendant was not prejudiced by the submission to the jury of a question which, *as a matter of law*, must be resolved in plaintiff's favor.

In the case of *Southern Pacific Co.* v. *Thomas*, 21 Ariz. 355, there was a question of fact as to how the train became separated, whether through the intentional opening of the couplers or because of some unnoticed

defect in them. The court held that the evidence sustained a finding that the couplers were defective; that such defect was a violation of the Act, and therefore negligence *per se*. In our case, of course, there is no question that the couplers were defective; the conclusion should be the same.

In *McAllister* v. *Terminal Railway Co.*, 324 Mo. 1005, it was a controverted question of fact whether the coupler was defective and broke. There was no such issue in our case, the undisputed evidence showing the defect and the break. The court in the *McAllister* case said, p. 1014: "If the coupler was defective and broke, permitting the two cars to become disengaged from the train, then defendant * * * violated the Safety Appliance Act and such violation was negligence *per se*."

In the case of *Philadelphia & R. Ry. Co.* v. *Eisenhart*, 280 F. 271, the court held that the mere opening of the couplers justified an inference that they were defective, and that such defect violated the act. In our case the defect was proved; there was no necessity or room for inference.

The rule to be deduced from the foregoing cases is that where it is uncertain whether there is a defect in a coupler, or whether it operated properly, the question is for the jury, who may infer that there was a defect. But where the defect is open, gross and palpable, as in the instant case, there is no occasion for drawing any inference; the violation is proved as a matter of law.

In *Lehigh Valley R. Co.* v. *Beltz*, 10 F. 2nd 74, which was a case under the Boiler Inspection Act, as was the *Scarlet* case, a locomotive boiler blew up, killing the engineer. The rule that the explosion of the boiler constituted evidence from which the jury might infer a violation of the Act was not followed in that case, despite

the language of the *Scarlet* case; on the contrary, the court peremptorily instructed for the plaintiff, leaving to the jury only the question of damages. This, of course, amounted to a holding that the explosion of the boiler was a violation of the Act as a matter of law. This court denied certiorari in the *Beltz* case (270 U.S. 641).

In the case of *Brady* v. *Terminal R. R. Assn.* 303 U.S. 10-16, (Opin. by the late Justice Hughes) it is said, p. 15:

> "The final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based on the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous. *St. Louis I. M. & S. Ry. Co.* v. *Taylor,* 210 U.S. 281, 295; *Chicago B. & O. Ry. Co.* v. *United States,* 220 U.S. 559, 570; *Louisville & Nashville R. Co.* v. *Layton,* 243 U.S. 617, 620, 621; *Great Northern Ry. Co.* v. *Otis, Supra,* (239 U.S. 349). The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railroad that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. *Southern Ry. Co.* v. *United States,* 222 U.S. 20. • • • The statute has been literally construed 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act.' *Swinson* v. *Chicago St. P. M. & O. Ry. Co.,* 294 U.S. 529, 531; *Davis* v. *Wolfe,* 263 U.S. 239, 243."

In the latter case it is held that "if the failure to comply with the requirements of the act is a proximate cause of the accident • • • although [plaintiff is] not engaged in an operation in which the safety appliances are specifically designed to furnish him protection" the railroad is, nevertheless, liable.

The principles announced in the foregoing opinion were reaffirmed in the case of *Myers* v. *Reading*, 331 U.S. 477, wherein this court also held that a violation of the Safety Appliance Acts (an alleged inefficiency of hand brake equipment in that case) may be shown by two methods, i. e., (1) by showing some particular defect, or (2) a failure to function when operated with due care. The test to be applied is the performance of the appliance, citing with approval *Philadelphia and R. R. Co.* v. *Auchenbach*, 3 Cir., 16 F. 2d 550. In the latter case it is said, p. 552:

> "The defendant's negligence, if any, consisted in violating a duty imposed by statute. The statute made it obligatory upon the defendant to equip its cars with safety appliances of a kind defined by their operation, namely, couplers that will couple automatically by impact. That duty is absolute and unqualified and contemplates the maintenance of such appliance in working condition 'at all times.' *P. & R. R. Co.* v. *Eisenhart* (C.C.A.) 280 F. 271, 276, and cases cited. The test of the observance of this duty is the performance of the appliances. 'The failure of a coupler to work at any time sustains a charge that the Act has been violated.'" (Citing cases.)

In the case of *Great Northern Ry. Co.* v. *Otis*, 239 U.S. 349, the trial court instructed the jury that if the injuries "were due directly to the absence and imperfect working condition of the coupler in question the defendant would be liable." There was a verdict and judgment entered in favor of the plaintiff, which was affirmed by the Supreme Court of Minnesota (128 Minn. 283, 150 N. W. 922). This court granted a certiorari and in affirming the judgment stated at p. 352:

> "Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, the Act of 1910 imports with unmistakable iteration, that the liability exists. Under the instructions of the court

> the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover. If so, the fact that the plaintiff's conduct contributed to the result was not a defense."

Our proffered instructions (R. 261, 262) predicated upon identical grounds were all refused.

Defendant speaks very learnedly of the rule which is said to have existed for more than 30 years that the jury may infer a Safety Appliance Act violation from the breaking of a coupler. This is a radical departure from its position on the trial. It pleaded that the Safety Appliance Act was not applicable at all (R. 14), argued this point on motion for directed verdict (R. 140), and in its objections to the charge of the court stated that "as a matter of law the breaking of a coupler does not prove nor permit an inference to a violation of the coupling provisions of the Federal Safety Appliance Act" (R. 195). It is only on appeal that defendant has made the concession that the Safety Appliance Act is even remotely applicable to our factual situation.

The defendant's assertion under point II that the fact that a coupler breaks "is evidence from which a jury may infer, but is not compelled to find negligence or a violation of the Safety Appliance Act" is contrary to the theory upon which it tried its case. On the trial defendant took the position and asserted that the breaking of the coupler did not constitute a violation of the statute as pleaded or come within its scope or purview.

In our petition for certiorari we inadvertently stated that defendant failed to test the sufficiency of our charge of a violation of the Safety Appliance Act by proper motion. We find that we were in error in so stating. The motion to test the sufficiency of the paragraph in

question is out of place and appears on the page preceding said paragraph.

The defendant, in its amended answer, under the heading Eighth Defense, (R. 14) stated:

> "Defendant denies that the Federal Safety Appliance Act applies to the movement, referred to in subparagraph (c) of paragraph 6 of plaintiff's complaint, as amended, and specifically denies that the coupler referred to in said paragraph failed to comply with the provisions of the Federal Safety Appliance Act."

Before the case was submitted to the jury, counsel for the defendant (R. 140) moved to strike subparagraph (c) of paragraph 6 of plaintiff's amended complaint. He stated:

> "Then the amendment of subparagraph (c) is that the defendant 'carelessly and negligently failed to equip and maintain on one of the cars being moved along said track a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary, was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act.'
>
> "The Safety Appliance Act, insofar as couplers are concerned, does not require that you have couplers that will not break or will not separate. The language of the Safety Appliance Act is that the cars must be equipped with couplers that would couple automatically on impact or which can be coupled without the necessity of men going between the ends of the cars. In other words, the Safety Appliance Act does not say that you must have safe and efficient couplers on them, nor does it say that the coupler which is ineffective or defective is a violation of the Safety Appliance Act. A coupler violates the Safety Appliance Act only if it fails to couple automatically by impact, without men going between the ends of

the cars. But a coupler on which the drawbar breaks in half is not within the purview of the Safety Appliance Act."

Counsel for defendant, in his objections to the court's charge also stated, among other things (R. 195):

> "Next, the defendant objects to the charge of the court insofar as it submits to the jury as the basis for liability, the charges contained in subparagraph (c) of paragraph 6 of plaintiff's complaint, as amended, for the reason that as a matter of law the breaking of a coupler does not prove nor permit an inference to a violation of the coupling provisions of the Federal Safety Appliance Act, as referred to in that subparagraph, as amended."

Defendant quotes from Roberts Federal Liabilities of Carriers (2nd Ed. 1929) Sec. 620, p. 1211, to the effect that "the true rule is that where a coupler does break the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act."

Mr. Roberts, who was then Commerce Counsel and is now Vice President and General Counsel for the Frisco System, notwithstanding his views as to the correct rule on this subject, had previously stated (p. 1209):

> "Proof that the cars became uncoupled without human intervention will undeniably tend to show such negligence, but to secure the benefits mentioned above, it is frequently attempted to prove that such negligence was more than mere common-law negligence; it is sought to characterize the use of cars which will and do uncouple inopportunely and without human intervention as *per se* an act in violation of the statute. This construction of the statute is not without judicial sanction. The Second Circuit Court of Appeals, for example, flatly declares that 'the purpose of the statute is aimed at keeping men out of the space between the cars, *but it is also aimed at insuring couplers that will hold together*' (italics ours).

> So also, Chief Justice White, speaking for the national Supreme Court, in affirming a judgment for plaintiff in a death action under the federal Employers' Liability Act, took occasion to mention 'the positive duty imposed by the statute (Safety Appliance Act) upon the railroad to furnish *safe* appliances for the coupling of cars' (italics ours), and in that case the only evidence of a breach of statutory duty on the part of the carrier was proof of an undesired and unexplained opening of the couplers between two cars of a moving train. Similarly the Arizona court, in a case of this same character, observed: 'The operative condition of the couplers involved in this case was not maintained, so that they would remain coupled during the haul of the train, and hence the Safety Appliance Act was violated,' and the Supreme Court denied a writ of certiorari to review the judgment against the carrier."

It will be observed that the interpretation of the Safety Appliance Act by Mr. Chief Justice White in the *Gotschall* case is directly in conflict with the views expressed by Mr. Roberts to the effect that while the jury may infer from the breaking of a coupler that it was "used in violation of the act", such a breaking is not *per se* an act in violation of the statute. The defendant cheerfully accepts and adopts Mr. Roberts' opinion as to what constitutes the "true rule", thereby incidentally overruling the unanimous opinion of this court as expressed by Mr. Chief Justice White. The Court of Appeals goes a step further and holds that the Safety Appliance Act does not even require the railroads to furnish couplers that "would not break".

This court's decision in the *Scarlet* case, 249 U. S. 528, holding that the breaking of the king pin of the coupler and the coupling chains did not establish as a matter of law negligence or a violation of the Boiler Inspection Act (45 U.S.C.A. § 23) is directly in conflict with every

case decided by this court prior to and since its rendition, commencing with the *Taylor* case, 210 U. S. 281, 294, decided in 1908, down to and including the *Coray* case, 335 U. S. 520. The opinion in the *Scarlet* case, we submit, is applicable only to cases arising under the Federal Employers' Liability Act (independently of the Safety Appliance Acts). The two cases cited and relied on (*New Orleans, etc., R. Co.* v. *Harris*, 247 U. S. 367, and *Yazoo* v. *Mississippi Valley R. R. Co.* v. *Mullins*, 249 U. S. 531) to support the court's conclusions were actions under the Federal Employers' Liability Act, not under the Safety Appliance Act. The court held in these cases that the so-called *prima facie act* of Mississippi could "not constitutionally be applied to suits under the Federal Employers' Liability Act * * *; that it relieved the plaintiff of the burden of proof to establish negligence" and that the defendant's rights were thereby prejudiced.

The court's action in reversing the judgment in the *Scarlet* case could be sustained on this ground alone, since *prima facie* acts or the scintilla of evidence rule are not applicable in actions brought under the Federal Employers' Liability Act. Nor does the burden of proof ever shift in such cases.

III.

While respondent's argument under this heading contains isolated excerpts from the instructions, it does not present a fair or accurate picture of the charge as a whole. Nowhere was the jury told that negligence was not an element of the safety appliance violation charge. The excerpt which respondent quotes at page 21 of its brief has to do with contributory negligence on the part of decedent and not with negligence of the defendant. On the contrary, the jury were repeatedly told that the plaintiff must prove that the defendant was guilty of neg-

ligence; that it was not sufficient to show that the defendant may possibly have been guilty of negligence but that the evidence must point to that fact.

While the court instructed the jury that if they found the defendant guilty of the violation of the Federal Safety Act and that such violation was the proximate cause of decedent's death, his contributory negligence would not bar the plaintiff's right to recover, nowhere did the court even remotely suggest or advise the jury that the violation of the statute was negligence *per se* or that the jury had the right to infer negligence therefrom. Under the court's instructions, the jury was required to find before the plaintiff could recover, that the breaking of the coupler was (1) a violation of the statute and (2) that the breaking was caused by defendant's negligence.

There is nothing in the record to indicate that the jury ever reached or considered at all the question of causal relation. The court instructed the jury that "the fact of an accident" or "the mere happening of an accident by which decedent lost his life does not in and of itself create a liability upon the defendant to pay for it • • •" and "carries with it no presumption of negligence on the part of defendant" (R. 187-189). Under the court's instructions the question whether the decedent was killed on the first movement when the coupler broke or on the second movement, as defendant now contends, became immaterial insofar as the defendant's liability was concerned. Had the jury concluded that the decedent was killed on the first movement (which they unquestionably did since there was no probative evidence upon which to base any other conclusion) they would, nevertheless, under the court's instructions be compelled to find the defendant not guilty. Our proffered instructions (R. 261, 262) which, with others identical in substance, were refused directing the jury that the breaking of the coupler as shown

by the evidence was a violation of the Safety Appliance Act and that if they found from a preponderance of the evidence that the decedent came to his death as a result thereof they should find the defendant guilty, stated the law correctly and embraced all the facts essential to the plaintiff's right to recover.

Both the Court of Appeals in its opinion and the defendant in its brief (pp. 26, 27), assert that the instruction at R. 189 has to do with proximate cause, and not with inferences of negligence. The opening sentences of the instruction are:

> "Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove."

There is not a word about proximate cause in the quoted language. It all has to do with negligence, and with the inferences which may be drawn from an accident. Where in this record is there any justification for the assertion that this language refers to proximate cause?

Counsel goes further and says (p. 27), that the "accident" referred to in the instruction is the running over of the decedent, and not the breaking of the coupler. Where does this appear? Where was this invidious distinction explained to the jury? How were they to know what accident was referred to in the instruction? Defendant cannot get away from the fact that in a Safety Appliance Act case, the jury were told that they could not infer negligence from the mere happening of the accident, which is incorrect even under the theory adopted by the Court of Appeals and urged by the defendant.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Petitioner.